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No. 82-1971

In the Supreme Court of the United States

OCTOBER TERM, 1982

MICHAEL M. SCHAEFER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly ordered backpay for six employees petitioner had unlawfully laid off or discharged.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1c-9c) is reported at 697 F.2d 558. The decision and order of the National Labor Relations Board (Pet. App. 1a-42a) are reported at 246 N.L.R.B. 181. The Board's supplemental decision and order (Pet. App. 1b-13b) are reported at 261 N.L.R.B. No. 42.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1e-2e) was entered on February 17, 1983. A petition for rehearing (Pet. App. 1d-4d) was denied on March 11, 1983. The petition for a writ of certiorari was filed on June 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.*, are set forth at Pet. 2-4.

STATEMENT

1. Pursuant to a Board-conducted representation election, the International Union of Operating Engineers, Local 66, A, B, C, D & R, AFL-CIO ("Local 66"), was certified as the bargaining representative of a group of petitioner's employees. During the ensuing bargaining negotiations, Local 66 filed charges with the Board alleging, *inter alia*, that petitioner had unlawfully laid off or discharged six employees because of their support for Local 66.[1] Petitioner requested that Local 66 withdraw its unfair labor practice charges "in the interest of making relations between the parties 'neat and clean' and 'to have a good relationship with everyone'" (Pet. App. 26a). Local 66 agreed to do so (*ibid.*), but, in fact, did not withdraw the charges.

At the unfair labor practice hearing held on Local 66's charges, petitioner contended that the complaint should be dismissed because Local 66 had agreed to withdraw its charges in consideration for concessions made by petitioner during negotiations (Pet. App. 35a). The Administrative Law Judge ("ALJ"), whose decision was affirmed in relevant part by the Board, found that petitioner did not insist upon withdrawal of the charges as a condition of his agreement to the terms of the contract (Pet. App. 35a-36a).[2] The ALJ found it un-

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[1] Local 66 filed a representation petition with the Board. Laborers' International Union of North America, Local 1058, AFL-CIO ("Local 1058") intervened and both unions participated in the ensuing election campaign which was won by Local 66 (Pet. App. 12a). Both unions represented other groups of petitioner's employees (*id.* at 11a). In its unfair labor practice charges, Local 66 also alleged that petitioner unlawfully assisted Local 1058 during the campaign and interrogated employees about their union activities.

[2] Accordingly, the ALJ rejected the General Counsel's allegation that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by improperly conditioning bargaining on withdrawal of Board charges.

necessary to determine the exact nature of the agreement between petitioner and Local 66. When an agreement to settle unfair labor charges is reached *after* Board proceedings have commenced, the NLRB will exercise its discretion to defer to such an agreement "'only when the unfair labor practices are substantially remedied and when * * * such dismissal would effectuate the policies of the Act'" (Pet. App. 36a). Since "the alleged agreement to withdraw the charges would have provided no remedy at all for the persons found here to have been discriminatorily laid off," the ALJ concluded that it would not effectuate the policies of the Act to defer to it (*ibid.*).

On the merits, the ALJ found, and the Board agreed, that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by laying off or discharging the six employees because of their support for Local 66. The Board ordered petitioner, *inter alia*, to reinstate the two employees who had not previously been recalled and to make all six employees whole for losses suffered as a result of the unfair labor practices. (Pet. App. 3a-4a, 36a-38a.)

2. Petitioner complied with the Board's order, except that he failed to reach agreement with the Board's Regional Office as to the amount of backpay due the six employees. Accordingly, after obtaining a stipulation from petitioner that he had no objection to the Board's order but had been unable to reach agreement on backpay,[3] the Regional Director issued a backpay specifica-

[3] The Board's Rules and Regulations, 29 C.F.R. 102.52, authorize the Board's regional directors to notice backpay disputes for hearing before an administrative law judge. However, the Board has determined that it is inadvisable to litigate disputes about the amount of a party's backpay liability when the party is still free to seek review of the underlying Board decision and order that is the basis for liability. Accordingly, absent agreement by the affected party to accept the underlying decision and

tion and notice of hearing that set forth the amounts that the Director had computed that petitioner owed the named discriminatees (C.A. App. 45-51). Thereafter, a backpay hearing was held before an administrative law judge in which petitioner repeated his contention that no backpay was owed because Local 66 had waived it in consideration for petitioner's entering into the collective bargaining agreement. Petitioner also asserted that four discriminatees had waived backpay by accepting money in settlement of their backpay claims.[4]

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order, "[i]t is the ordinary practice of the Board not to consider the amount of backpay until its general remedial order has been enforced by the court on its merits, in order to avoid unnecessary efforts if enforcement be denied." *NLRB* v. *Nickey Chevrolet Sales, Inc.*, 493 F.2d 103, 106 (7th Cir.), cert. denied, 419 U.S. 834 (1974). Where the party does not intend to contest the validity of the underlying decision, it is the Board's policy to obtain a stipulation to that effect from the respondent and proceed directly to a backpay determination. N.L.R.B., *Case-Handling Manual* (Pt. 3) § 10652 (1977).

The stipulation signed by petitioner, on April 23, 1980, stated that he had "no objection to the Board's order," that he had "not been able to reach agreement with the General Counsel as to the amount of backpay due" the discriminatees, and that, in any judicial proceedings "to enforce or to review the Board's backpay determination, the only issue before the court [would] be the validity of the backpay computations" since petitioner "concedes that in all respects the Board's Order [of October 22, 1979], is valid and proper" (C.A. App. 43-44).

[4] In November 1979, several weeks after issuance of the Board's decision and order, petitioner offered payments to the six employees in exchange for a waiver of any backpay to which they would be entitled under the Board's order. Four employees accepted the offer (Pet. App. 6b).

The four employees signed a statement which read (C.A. App. 326-329):

> I accept the following amount [ ] in full payment for lost wages including interest based on my earnings since my lay-off.
>
> I intend to be legally bound by this document.

The ALJ, whose decision was affirmed by the Board, rejected petitioner's waiver contentions. The ALJ pointed out that he was bound by the Board's rejection in the underlying unfair labor practice proceeding of the claim of a waiver by Local 66 (Pet. App. 6b-7b). With respect to the alleged waiver by the four employees, the ALJ stated that such claims could not be waived, "since it is not a private right which attaches to the discriminatee, but is * * * a public right which only the Board or the Regional Director may settle" (Pet. App. 7b). However, in determining the amount of backpay due the employees, the ALJ's specification reflected deductions for the amounts petitioner paid to the four employees (Pet. App. 2b n.5).

3. The court of appeals upheld the Board's backpay order (Pet. App. 2c).[5] The court held that the Board had not abused its discretion in resolving the unfair labor practice complaint despite waivers given by the four employees and Local 66's agreement in the bargaining negotiations to withdraw the charges. The court pointed out that the merits of the unfair labor practice charges were not discussed and considered by

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The sums received by the employees were Bumgardner, $400.00; Drinkwater, $700.00; Kerfonta, $750.00; Long, $500.00 (C.A. App. 326-329).

[5] The Board contended in the court of appeals that petitioner's agreement to the April 23 stipulation (*supra*, note 3) precluded him from challenging any issue except the computation of backpay. In rejecting the Board's position, the court asserted that the Board did not view the stipulation as a waiver of the right to seek judicial review of the underlying Board decision (Pet. App. 5c). Contrary to the court's understanding, the Board does maintain that the stipulation constituted a waiver of petitioner's right to seek judicial review of all issues except backpay computation. Should the petition for a writ of certiorari be granted, the Board will argue that the judgment of the court of appeals should be upheld on that additional ground.

the Union or by the employees who gave the releases (*id.* at 8c).

ARGUMENT

Petitioner contends (Pet. 8-12) that the Board's decision is contrary to settled Board policy and that the decision of the court of appeals conflicts with that of the Fourth Circuit in *Roadway Express, Inc.* v. *NLRB*, 647 F.2d 415 (1981). There is no merit to these contentions.

1. It is the Board's policy to encourage all-party, private resolution of labor disputes. To that end, the Board will defer to such settlements when they resolve unfair labor practice charges and are not repugnant to the policies of the Act. Thus, in *Coca-Cola Bottling Co. of Los Angeles*, 243 N.L.R.B. 501, 502 (1979), the union, the suspended employee and the employer entered into a post-charge, pre-arbitration settlement that resolved the matter at issue in the unfair labor practice proceeding and provided for reinstatement without backpay. In those circumstances, the Board held that the employer did not violate Section 8(a)(1) of the Act by conditioning reinstatement on withdrawal of the Board charge, pointing out that "[t]he settlement agreement was the product of negotiations during which each of the parties made concessions." Similarly, in *Central Cartage Co.*, 206 N.L.R.B. 337, 338 (1973), the Board deferred to a settlement agreement entered into by the union, the involved employee (Dominiak) and the employer that resolved a work dispute issue pending before the Board. The Board noted that "[t]he settlement clearly indicates that all issues in dispute were considered and appropriately resolved in a manner which disposes of not only the Dominiak matter but also similar issues involving related job assignments." See also *Krause Honda, Ltd.*, 8 N.L.R.B. Advice Memo. Rep. ¶ 18,221 (1981) (recommending dismissal of charge, where the union, employer and employee

agreed to reinstatement conditioned on employee passing a welding test); *Beloit Corp., Jones Division*, 6 N.L.R.B. Advice Memo. Rep. ¶ 14,177 (1979) (recommending dismissal where all parties agreed to settlement involving reduction of discipline).

However, where a private settlement does not involve the consent of all the affected parties or does not substantially remedy the unfair labor practices alleged before the Board, the Board will not defer to it. Thus, in *Clear Haven Nursing Home*, 236 N.L.R.B. 853, 854 (1978), the Board refused to defer to a settlement that provided for the execution of a collective agreement, but provided no remedy for certain alleged violations of Section 8(a)(1) of the Act, and also provided for reinstatement but with no backpay for unfair labor practice strikers. The Board noted that the employees had not been made aware of their absolute right to reinstatement when they approved the settlement and found that the execution of the contract did not effectively remedy the unfair labor practices. Similarly, in *Local Union No. 2, United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Industry*, 152 N.L.R.B. 1093, 1112, 1113 (1965), enforced, 360 F.2d 428 (2d Cir. 1966), the Board refused to defer to a strike settlement agreement in which the employer and the affected employees did not participate and which did not resolve the alleged unfair labor practices at issue in the Board proceeding. Moreover, the Board will not defer to a private settlement where the alleged violation at issue in the unfair labor practice proceeding was not raised or resolved during the settlement negotiations. *Sabine Towing & Transportation Co.*, 224 N.L.R.B. 941 (1976); accord, *Owens Corning Fiberglas Co.*, 236 N.L.R.B. 479 (1978).

Assuming arguendo, as did the ALJ (Pet. App. 36a), that Local 66 agreed to withdraw the unfair labor practice charges during contract negotiations, that agree-

ment, as the ALJ found (*ibid.*), did not resolve or remedy the alleged unfair labor practices.[6] Moreover, the affected employees did not participate in or approve it. Accordingly, the agreement plainly would not have met the criteria established by the Board for deferral to private settlements. In the circumstances, it was unnecessary for the ALJ to resolve the issue of whether such an agreement was actually made.

The waivers signed by the employees in exchange for a cash settlement of their backpay claims also did not meet the Board's criteria. All of the cases relied upon by petitioner (see pages 6-7, *supra*) involved settlements *before* issuance of the Board's decision. The employees' waivers here were not, in fact, in settlement of an unresolved unfair labor practice, but merely a compromise of a backpay claim. The Board does not consider such a compromise to be a substantial remedy for an

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[6] Contrary to petitioner's assertion (Pet. 5), the Board did not find that petitioner agreed to more favorable contract terms in exchange for withdrawal of the charges. Rather, the ALJ found that the favorable bargaining terms that the employees obtained were a result of their selection of Local 66 as bargaining agent, rather than Local 1058, and that was the reason petitioner had unlawfully assisted Local 1058 during the election campaign (Pet. App. 30a). The ALJ specifically rejected petitioner's assertion that contract concessions were conditioned on withdrawal of the charges (*id.* at 35a-36a).

unfair labor practice.[7] See, *e.g.*, *Robinson Freight Lines*, 117 N.L.R.B. 1483, 1486 (1957).

2. Petitioner, relying on *Roadway Express Inc.* v. *NLRB*, 647 F.2d 415 (4th Cir. 1981), contends (Pet. 10-12) that deferral to a private settlement, as distinct from an arbitral award, is appropriate even if the alleged unfair labor practice is not resolved therein. There is no merit to that contention.

In *Roadway Express, Inc., supra*, 647 F.2d at 424-425; footnote omitted, the Fourth Circuit agreed with the Board that deferral to a private settlement "will not be appropriate if the merits of the claim which are the subject-matter of the settlement and of the Labor Board proceeding were never discussed or considered in the settlement negotiations,"[8] citing *Sabine Towing & Transportation, supra; Owens Corning Fiberglas Co., supra.*[9] Similarly, in finding here that the

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[7] There is no merit to petitioner's assertion (Pet. 8) that the employees will be "unjustly enriched." The backpay specification took into account the amounts paid to them by petitioner (Pet. App. 2b n.5).

That the backpay compromise offered by petitioner did not substantially remedy the unfair labor practice is shown by comparison of the amount tendered by petitioner and the backpay ordered by the Board: Bumgardner, $400 from petitioner and $1,018 backpay; Drinkwater, $700 from petitioner and $1,646 backpay; Kerfonta, $750 from petitioner and $5,771.80 backpay; Long, $500 from petitioner and $16,648.48 backpay (Pet. App. 13b).

[8] In *Roadway Express*, the court found on the facts presented that the propriety of the discharge had been discussed in the settlement negotiations (647 F.2d at 425).

[9] Petitioner's assertion (Pet. 10)—that "no settlement agreement can pass muster" if scrutiny must be given to the claimed unfair labor practice because, since there is no arbitration proceeding, there is no opportunity for such scrutiny—misconstrues the Board's policy. That policy does not require a formal resolution of the unfair labor practice claim, but only that it be addressed, resolved and substantially remedied.

Board had not abused its discretion in conducting the backpay proceeding the court of appeals noted that the merits of the claimed violations had not been addressed (Pet. App. 8c). There is, thus, no difference in this respect between the decision below and that in *Roadway Express*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner appears to suggest (Pet. 8-9) that the court below held that the Board need not defer to a private settlement. The court did not so hold. Although it noted the lack of precedent in its circuit for the proposition that the Board should defer to private agreements as distinct from arbitration awards, it enforced the Board's order because it found that the established criteria for deferral were not met here.